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SUPREME COURT

In the

Supreme Court of the

October Term,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, [illegible],
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement	5
The Questions Presented Are Substantial	10
Conclusion	22
Appendix—Statutes Involved	1a

CITATIONS

Cases:

Addison v. Holly Hill Co., 322 U.S. 607	22
Atchison, Topeka and Santa Fe R. Co. v. United States, 225 F. Supp. 584	16
Atlantic Coast Line R. Co. v. Arcade & A. R. Corp., 194 I.C.C. 729	10, 19
Atlantic Coast Line R. Co. v. Arcade & A. R. Corp., 198 I.C.C. 375	10, 19
Atlantic Coast Line R. Co. v. Florida, 295 U.S. 301	22
Baltimore & Ohio R. Co. v. United States, 298 U.S. 349	2, 11, 14, 19
Beaumont, S. L. & W. R. Co. v. United States, 282 U.S. 74	10, 12, 14, 19, 21
Beaumont, S. L. & W. Ry. Co. v. United States, 36 F. 2d 789	21
Boston & Maine Railroad v. United States, 208 F. Supp. 661	11, 12, 14, 16

PAGE

Boston & Maine Railroad v. United States, 371 U.S. 26 ..... 11, 12, 14, 16

Class Rate Investigation, 1939, 281 I.C.C. 213 9

Class Rate Investigation, 1939, 286 I.C.C. 5 9

Class Rates, Mountain-Pacific Territory, 296 I.C.C. 555 9

Divisions of Freight Rates, 148 I.C.C. 457 ..... 10, 19

Divisions of Freight Rates, 156 I.C.C. 94 ..... 10, 21

Divisions of Rates, Official and Southern Territories, 234 I.C.C. 175 11

Inland Steel Co. v. United States, 306 U.S. 153 22

Interstate Commerce Commission v. Hoboken R. Co., 320 U.S. 368 21

Interstate Commerce Commission v. New York, N. H. & H. R. Co., 287 U.S. 178 15

Interstate Commerce Commission v. New York, N. H. & H. R. Co., 372 U.S. 744 2

Louisville & N. R. Co. v. Akron, C. & Y. R. Co., 309 I.C.C. 491 11

New England Divisions, 66 I.C.C. 196 10

New England Divisions Case, 261 U.S. 184 ..2, 10, 12, 14, 15

New York v. United States, 331 U.S. 284 12

Official-Southern Divisions, 287 I.C.C. 497 11

Official-Southern Divisions, 289 I.C.C. 4 11

Official-Southern Divisions, 325 I.C.C. 1 15

Official-Southwestern Divisions, 287 I.C.C. 553 11

Official-Southwestern Divisions, 289 I.C.C. 11 11

PAGE

Official Western Trunk Line Divisions, 269 I.C.C. 765 .. 11

Southwestern-Official Divisions, 216 I.C.C. 687 11

Southwestern-Official Divisions, 234 I.C.C. 135 11

United States v. Abilene & S. R. Co., 265 U.S. 274 12

United States v. Morgan, 307 U.S. 183 22

Statutes:

Administrative Procedure Act
Section 8(b), 5 U.S.C. 1007(b) 2, 2a
Section 10(e), 5 U.S.C. 1009(e) 2, 2a

Interstate Commerce Act
Section 1(4), 49 U.S.C. 1(4) 2, 1a
Section 15(6), 49 U.S.C. 15(6) .....2, 3, 4, 7, 10, 11, 12, ... 13, 14, 15, 16, 17, 18, 19, 20, 1a

5 U.S.C. 1009 2

28 U.S.C. 1253, 2101(b) 2

28 U.S.C. 1336, 1398, 2284, 2321-2325 2

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

JURISDICTIONAL STATEMENT

Appellants, Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad Company appeal from the judgment of the United States District Court for the Southern District of California, Central Division, which set aside orders of the Interstate Commerce Commission, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the district court (B. & O. J.S. 1a-21a)[1] is reported at 238 F. Supp. 528. The initial report of the Interstate Commerce Commission (B. & O. J.S. 25a-117a) is printed at 321 I.C.C. 17. The supplemental report of the Commission on reconsideration (B. & O. J.S. 122a-171a) is printed at 322 I.C.C. 491.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321-2325, and 5 U.S.C. 1009, to set aside orders of the Interstate Commerce Commission. The final judgment of the three-judge district court was dated February 17, 1965, and entered on February 18, 1965. These appellants filed their notice of appeal in that court on March 25, 1965.

The jurisdiction of the Supreme Court to review the judgment of the district court by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *New England Divisions Case,* 261 U.S. 184 (1923); *Baltimore & Ohio R. Co. v. United States,* 298 U.S. 349 (1936); *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.,* 372 U.S. 744 (1963).

STATUTES INVOLVED

Sections 1(4) and 15(6) of the Interstate Commerce Act and Sections 8(b) and 10(e) of the Administrative Procedure Act (49 U.S.C. 1(4) and 15(6), and 5 U.S.C. 1007(b) and 1009(e), respectively) are set forth in the Appendix hereto. Particularly involved is the construction of the fol-

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[1] B. & O. J.S. refers to the Appendices to the Jurisdictional Statement filed by The Baltimore and Ohio Railroad Company, et al., in No. 1169, October Term, 1964.

lowing portion of Section 15(6) of the Interstate Commerce Act:

> In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to [1] the efficiency with which the carriers concerned are operated, [2] the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and [3] the importance to the public of the transportation services of such carriers; and also [4] whether any particular participating carrier is an originating, intermediate, or delivering line, and [5] any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge. (Numbers added)

QUESTIONS PRESENTED

The questions presented by this appeal arise out of the judgment and opinion of the district court, which set aside orders entered by the Interstate Commerce Commission prescribing just, reasonable, and equitable divisions of joint rail rates on transcontinental freight traffic in proceedings which involved more than 300 railroads. These proceedings were tried, argued, and submitted by the parties, and decided by the Commission, as controversies between three contending groups of carriers by railroad: namely, Eastern or Official Territory railroads, Midwestern railroads, and Transcontinental or Mountain-Pacific railroads. The salient questions are:

Did the district court misconstrue Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)), or otherwise err:

1. When it held that, in addition to the findings made as to the contending groups of railroads, the Commission was required to make findings as to each individual railroad in each group respecting each factor enumerated in Section 15(6)?

2. When it held, with respect to the revenue needs factor of Section 15(6), that the Commission was required to make findings which state "in terms of dollars" the amounts required by the carriers to pay their operating expenses, taxes, and a fair return on their carrier property, and that the findings which were made by the Commission failed to satisfy Section 15(6) because they were stated in terms of annual rates of return?

3. When it held that the Commission was required to find the differences "in terms of dollars" between the revenues produced by the unlawful divisions and the revenues which might be produced by the prescribed lawful divisions?

Other substantial questions[2] are:

4. Whether the district court misconstrued Section 15(6), or otherwise erred, when it held that the Commission erroneously failed to find that the prescribed divisions would be just, reasonable, and equitable "as to each individual carrier in each division."

5. Whether any of the alleged errors of the Commission were prejudicial to any of the appellees.

6. Whether the district court erred in setting aside those portions of the Commission's orders which found that the present divisions are unjust, unreasonable, and inequitable,

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[2] Questions 1, 2, and 3 are discussed in the section entitled "The Questions Presented Are Substantial" in subsections I, II, and III, respectively. Questions 4, 5, and 6 are discussed in text and notes at appropriate points.

and in remanding the cause to the Commission without retaining jurisdiction to require such resettlements of revenue received by the parties from transcontinental freight rates as might be just and equitable in the event of any further decision or order of the Commission.

STATEMENT

This case involves the validity of orders entered by the Interstate Commerce Commission in its Docket No. 31503 and sub-numbers entitled *Akron, Canton & Youngstown R. Co., et al.* v. *Atchison, Topeka & Santa Fe Ry. Co., et al.*, which is known as the *Transcontinental Divisions Case.* (B. & O. J.S. 25a-117a, 122a-171a) These orders prescribed new divisions of joint rail rates on transcontinental freight traffic between points in Eastern and Midwestern Territories, on the one hand, and points in the section of Mountain-Pacific Territory known as Transcontinental Territory, on the other hand.[3] The revenues produced by these

[3] Eastern (Official) Territory is the section of the country east of Lake Michigan; Chicago and Peoria, Illinois; St. Louis, Missouri; and Cairo, Illinois; and north of the Ohio River, including West Virginia and most of Virginia.

Transcontinental Territory is the western part of Mountain-Pacific Territory, and lies generally west of El Paso, Texas; Albuquerque, New Mexico; Ogden, Utah; and the western border of Montana. The orders of the Commission also cover divisions of joint rates on traffic to and from points in Montana via the Twin Cities and other northern gateways; and for that limited purpose Montana was considered a part of Transcontinental Territory in the proceedings before the Commission.

Mountain-Pacific Territory includes generally the eleven Mountain-Pacific states except the southeastern corner of Wyoming, eastern Colorado, and eastern New Mexico. The border of Mountain-Pacific Territory is a line from El Paso, Texas, through Albu-

joint rates amount to approximately 1.5 billion dollars annually.

In the proceedings before the Commission, the 300 or more railroads which participate in the joint rates were arrayed generally into three carrier groups: Eastern railroads, which were the complainants in I.C.C. Docket No. 31503; Midwestern railroads, which were the complainants in I.C.C. Docket No. 31503 (Sub-No. 1); and the defendant Mountain-Pacific railroads.[4]

Two separate sets of divisions are covered by the challenged orders. The first set is referred to in the reports of the Commission as "interterritorial" divisions, and involves a two-way "primary" divisional break of joint rates

querque, New Mexico; Pueblo and Denver, Colorado; Cheyenne, Wyoming; and thence the eastern boundaries of Wyoming and Montana.

Midwestern Territory is generally the section of the country between Official Territory and points on the Mississippi River south of Cairo, Illinois, on the one hand, and Mountain-Pacific Territory on the other.

Western Territory embraces Midwestern and Mountain-Pacific Territories.

[4] The railroads which operate in Eastern Territory are referred to as Eastern Lines.

The Western railroads whose participation in the involved transcontinental traffic is entirely or predominantly in Midwestern Territory are referred to as Midwestern lines.

The Western railroads which operate entirely or substantially in Mountain-Pacific Territory are referred to as the Mountain-Pacific lines or Transcontinental lines. These lines are sometimes referred to in the Commission's reports as defendants. Five of them—Santa Fe, Southern Pacific, Union Pacific, Great Northern, and Northern Pacific—have extensive operations, directly and through subsidiary lines, in Midwestern Territory, and interchange traffic with Midwestern lines at various junctions within that territory.

on Eastern-Transcontinental traffic. These divisions break at Chicago, Peoria, St. Louis, and other gateways between Eastern lines and Western lines. The Eastern primary divisions cover the services of the Eastern lines east of these gateways. The Western primary divisions cover the services of the Midwestern lines and the Mountain-Pacific lines performing the hauls west of those gateways.

The second set of divisions is referred to in the reports of the Commission as "intraterritorial" divisions because they relate to service within Western Territory. They involve a controversy between the Midwestern and Mountain-Pacific groups with respect to the divisions on Midwestern-Transcontinental traffic and the subdivisions of the Western primary divisions on Eastern-Transcontinental traffic. Part of the traffic covered by the intraterritorial divisions is interchanged between Midwestern lines and Mountain-Pacific lines at points on the border of Mountain-Pacific Territory, principally Denver and Pueblo, Colorado; and El Paso, Texas; but the greater part is interchanged between Midwestern lines and Mountain-Pacific lines at points within Midwestern Territory, such as the Twin Cities, Minnesota; Council Bluffs, Iowa; Kansas City, Missouri; and Ft. Worth, Texas.

After consideration of an exhaustive record, the Commission concluded that the divisions under attack, which had been in effect for some 40 years, were unjust, unreasonable, and inequitable, and prescribed just, reasonable, and equitable divisions. These conclusions were reached upon consideration of the factors specified in Section 15(6). The following factors, among others, were the subject of specific findings for each of the three contending groups:

(1) Relative efficiency of operation (B. & O. J.S. 92a);

(2) Revenues required as measured by (a) the relationship between the revenues and out-of-pocket expenses, including return on the transcontinental traffic in issue (B. & O. J.S. 63a-68a); (b) the comparative over-all net railway operating income and rate of return from all services (B. & O. J.S. 74a-82a, 87a, 88a); and (c) trends in various indices of economic development, industrial and population growth, including tonnage, expenses, revenues, and net operating income from railroad freight services, and also including the growth and economic development of Mountain-Pacific Territory and the resulting improvement in conditions affecting the operations of the Mountain-Pacific lines (B. & O. J.S. 71a-76a, 96a-98a);

(3) Relative importance to the public of the transportation services of the several groups of carriers (B. & O. J.S. 92a-95a);

(4) Relative positions as originating, intermediate, or delivering carriers (B. & O. J.S. 29a-37a, 43a, 44a, 64a-69a, 124a, 125a); and

(5) Relative cost of service (B. & O. J.S. 42a-71a, 78a, 124a-132a).

The Commission prescribed increases in the Eastern primary divisions of the Eastern-Transcontinental traffic, and corresponding reductions in the Western primary divisions. (B. & O. J.S. 98a-102a, 110a-114a, 162a-166a) As between the Midwestern lines and the Mountain-Pacific lines, the Commission prescribed 50-mile block scales of divisional factors to be used in determining specific percentage divisions, in lieu of the existing group-to-group percentage divisions, which had been found unlawful. The prescribed mileage-block factors were made 10 percent higher in Mountain-Pacific Territory than in Midwestern Territory. (B. & O. J.S. 103a, 104a, 114a-117a, 167a-170a) The present divisions of the Mountain-Pacific lines are so inflated that the prescribed 10 percent inflation in the Moun-

tain-Pacific factors would reduce the Mountain-Pacific lines' divisions, and would produce "moderate increases in some of the most important midwestern divisions."[5] (B. & O. J.S. 104a) The conclusions of the Commission reflect a balancing of considerations of cost of service, revenue needs, and other relevant matters, including the structure of class rates which the Commission had prescribed for Mountain-Pacific Territory.[6] (B. & O. J.S. 95a-104a, 142a-146a, 150a-153a)

On June 25, 1963, a group of Mountain-Pacific railroads filed a complaint in the district court seeking to enjoin and set aside the Commission's orders.[7] These appellants and the Eastern lines intervened as defendants. The enforcement of the Commission's orders was enjoined pending final hearing and disposition of the matter by the district court.

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[5] As the Commission pointed out, when measured by mileage, the original 19th century divisions between the Midwestern and the Mountain-Pacific lines reflected an inflation of 50 percent, and the present divisions, which the Commission found unlawful, reflect an inflation ranging as high as 85 percent, and averaging 19 percent, in favor of the Mountain-Pacific lines. (B. & O. J.S. 37a, 38a, 41a)

[6] In *Class Rates, Mountain-Pacific Territory,* 296 I.C.C. 555 (1955), the Commission prescribed class rates for Mountain-Pacific Territory on a level higher than the class rates previously prescribed for Midwestern and Eastern Territories in *Class Rate Investigation, 1939,* 281 I.C.C. 213, 286 I.C.C. 5. The Commission held that this fact bears upon the lawful relationships between the prescribed scales of divisional factors within Western Territory. (B. & O. J.S. 104a, 145a, 146a)

[7] A number of other railroads serving Mountain-Pacific Territory, the State of California, and regulatory agencies of nine other Mountain-Pacific states intervened as plaintiffs in support of the Mountain-Pacific lines. The St. Louis-San Francisco Railway and the Missouri-Kansas-Texas Railroad, which are Midwestern lines whose revenues are alleged to be reduced by the Commission's orders, also intervened as plaintiffs.

In an opinion rendered on January 25, 1965, the district court held that the assailed orders should be set aside and the cause remanded to the Commission for further proceedings consistent with the opinion. The district court accepted the findings made by the Commission as supported by substantial evidence and as reflecting a rational exercise of discretion, but held that the Commission had misconstrued the requirements of Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)) and had failed to make necessary findings.

On February 17, 1965, the district court made its judgment setting aside the Commission's orders and remanding the cause to the Commission for further proceedings consistent with the court's opinion. Contemporaneously therewith, the court granted a stay of judgment pending disposition or termination of the appeals to this Court, and continued in effect the interlocutory injunctions previously entered. (B. & O. J.S. 22a-24a)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal brings to this court some of the most important issues which have arisen under Section 15(6) of the Interstate Commerce Act since the landmark opinion in *New England Divisions Case*, 261 U.S. 184 (1923). By a novel construction of Section 15(6), the district court has cast doubt on the procedures which the Commission has followed since the *New England Divisions Case*.[8] The reso-

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[8] See, *e.g.*, *New England Divisions*, 66 I.C.C. 196 (1922), order upheld, *New England Divisions Case*, 261 U.S. 184 (1923); *Divisions of Freight Rates*, 148 I.C.C. 457 (1928), 156 I.C.C. 94 (1929), order upheld, *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U.S. 74 (1930); *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729 (1933), 198 I.C.C. 375 (1934), order upheld,

lution of the issues of statutory construction presented by this appeal is vital to the practical administration of Section 15(6) of the Interstate Commerce Act in all interterritorial divisions cases.

I.

The district court held that the Commission was required to make affirmative findings with respect to each of the factors specified in Section 15(6), "not only as to the groups of roads involved but with respect to each carrier affected in said groups."[9] (B. & O. J.S. 20a; see also 12a, 13a, 17a,

Baltimore & Ohio R. Co. v. *United States,* 298 U.S. 349 (1936); *Southwestern-Official Divisions,* 216 I.C.C. 687 (1936); *Southwestern-Official Divisions,* 234 I.C.C. 135 (1939); *Divisions of Rates, Official and Southern Territories,* 234 I.C.C. 175 (1939); *Official-Western Trunk Line Divisions,* 269 I.C.C. 765 (1948); *Official-Southern Divisions,* 287 I.C.C. 497 (1953), 289 I.C.C. 4 (1953); *Official-Southwestern Divisions,* 287 I.C.C. 553 (1953), 289 I.C.C. 11 (1953); *Louisville & N. R. Co.* v. *Akron, C. & Y. R. Co.,* 309 I.C.C. 491 (1960), order upheld, *Boston & Maine Railroad* v. *United States,* 208 F. Supp. 661 (D. Mass., 1962), affirmed 371 U.S. 26 (1962).

[9] The district court also held that the Commission erroneously failed to "find that the divisions are just, reasonable and equitable not only between the groups of carriers involved but also as to each individual carrier in each division." This conclusion was injected by the district court; none of the appellees claimed that the Commission was required to make such findings. If the district court is holding simply that there is a technical failure to make findings applicable to individual divisions of individual roads, it mistakes the character of the findings actually made. The Commission found the divisions which would be lawful between any two points, over the territorial dividing points, with such divisions applying to each and every carrier before the Commission. (B. & O. J.S. 105a, 106a, 160a, 161a) In similar circumstances, another

18a) The findings made by the Commission with respect to each of the Section 15(6) criteria are on a group basis, except where findings addressed to individual roads were made in response to particular contentions or to portray typical situations.

The three contending groups of railroads presented their case to the Commission on a group basis, with each group asking the Commission to prescribe divisions of the same character for all members of its group, without differentiation as among group members. Each group presented evidence relevant to Section 15(6) factors for the group as a whole.[10] The parties also presented evidence of typical divisions of joint rates of named railroads, showing origins

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three-judge court held findings like those here involved were sufficient, and rejected a contrary contention. *Boston & Maine Railroad* v. *United States,* 208 F. Supp. 661, 674 (D. Mass., 1962); affirmed 371 U.S. 26 (1962). If the district court is holding that the Commission must make a separate finding as to the lawfulness of each division of each carrier in an interterritorial divisions case, thus requiring the Commission to make findings as to all subdivisions of the interterritorial divisions in issue, it is in direct conflict with *New England Divisions Case,* 261 U.S. 184, 202-203 (1923); *United States* v. *Abilene & S. R. Co.,* 265 U.S. 274, 283 (1924); and *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U.S. 74, 90 (1930), which hold that the Commission may dispose of the main divisions controversy before it, without at the same time disposing of subsidiary conflicts. Similarly, in *New York* v. *United States,* 331 U.S. 284, 343 (1947), this Court said, in sustaining the Commission's prescription of class rates alone, that "there is no reason in law why the Commission need tackle all evils in the rate structure or none."

[10] Much of the data applicable to each of the three groups were based on scientifically determined random samples of the traffic in issue, drawn by the country's leading statisticians. Both the Midwestern and the Mountain-Pacific groups introduced scientific samples of the involved traffic. For each movement in the sample, they examined the interline abstracts of settlement and the waybills and recorded the total revenues for the movement, revenues received

and destinations, the particular routes over which such rates applied, the divisions maintained in connection with those rates, and the costs incurred by the carriers. Nevertheless, no individual railroad asked for special treatment apart from its group, and no railroad questioned the authority of the Commission to make its findings on a group basis, without making findings with respect to each factor for each of the more than 300 railroads which collectively comprise the three groups.[11]

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by each railroad, and data relevant to calculation of the total costs of the movement and the portion of the costs assignable to each originating, intermediate, and delivering railroad. By use of modern data computers, the information for the individual sample movements were weighted and aggregated to produce revenue and cost information for each group. Data used in this process were thoroughly examined by all parties, and were the subject of exhaustive cross-examination and rebuttal testimony. (B. & O. J.S. 29a, 43a-49a) The record contains the detail for each movement in a subsample of the Midwestern group's sample of involved movements, showing for each shipment the commodity, the handling railroads, the points of interchange, the origin and destination, the type of car, the weight of lading, the total revenue, the revenue to each group, the total cost, and the cost to each group.

[11] The Mountain-Pacific lines' contention in the court below that the Commission had erred in failing to make findings with respect to individual carriers was limited to the revenue needs factor of Section 15(6), and was argued specifically only as to The Denver and Rio Grande Western Railroad Company. This contention of the Mountain-Pacific lines was not consistent with the position of those lines, including the Denver and Rio Grande Western, in the Commission proceedings, where they opposed the prescription of divisions for individual carriers in Mountain-Pacific Territory. (B. & O. J.S. 147a) The Missouri-Kansas-Texas Railroad Company and the St. Louis-San Francisco Railroad Company (the two Midwestern lines which intervened in the district court as plaintiffs) limited their claim that the Commission had erred in failing to make findings with respect to individual carriers to the efficiency factor of Section 15(6). This claim, however, was not presented to the Commission in their petition for reconsideration or otherwise, and was contrary to representations made by them to the Commission.

The course followed by the Commission not only disposed of all questions presented by the adversaries before it, but it also was in harmony with this Court's construction of Section 15(6) in cases involving interterritorial divisions. In *New England Divisions Case,* 261 U.S. 184, 197-199 (1923); *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U.S. 74, 81-83 (1930); *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349 (1936); *Boston & Maine Railroad* v. *United States,* 208 F.Supp. 661 (D. Mass., 1962), affirmed 371 U.S. 26 (1962), this Court sustained Commission orders fixing interterritorial divisions on a group basis upon findings directed to the groups, with no findings directed to the Section 15(6) factors for each of the individual lines.

If the district court is right that specific findings with respect to each individual line are essential to the validity of the challenged orders, then, on remand, the Commission must receive evidence from more than 300 individual railroads with respect to each standard specified in Section 15(6). As a minimum, this evidence would embrace the operating expenses, taxes, investment in and rate of return on carrier property of each individual railroad; the revenues and costs (including return) attributable to the involved services of each railroad; the importance to the public of such services; and the efficiency with which these services were conducted. The Commission would then be required to make separate findings for each railroad with respect to these matters, as well as a separate adjudication "as to each individual carrier in each division." (B. & O. J.S. 15a)

Mr. Justice Brandeis, speaking for a unanimous Court in the *New England Divisions Case,* 261 U.S. 184, 197 (1923), in which 600 individual railroads were involved, recognized the kind of a problem with which the Commission would be confronted on such a construction of Section 15(6) when he declared:

> Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed.... To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief.

Wholly apart from the intolerable burden such a procedure would place on the parties and the Commission in an interterritorial divisions dispute, such cumbersome procedures could not produce meaningful results. In the final analysis, the Commission would necessarily aggregate data by contending groups in order to prescribe interterritorial divisions.

To construe Section 15(6) as requiring adjudication as to each separate division of each individual carrier is contrary to the procedures which the Commission has followed with the approval of this Court going back as far as the *New England Divisions Case*.[12] The group consideration of interterritorial divisions had "that sanction of validity which is born of long administrative practice." *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U.S. 178, 190 (1932). The reversal of the settled Commission practice, which would impose unnecessary burdens and delays in the administration of Section 15(6), should

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[12] In some of the interterritorial divisions cases, findings have been made with respect to individual carriers which sought special treatment because of allegedly greater financial needs than other carriers in their territory, and in most of such cases findings have been made relating to individual carriers or the principal carriers in a group for purposes of illustration or discussion; but in no such case has the Commission made findings with respect to *each* of the Section 15(6) criteria for *each* of the individual carriers. (See cases cited in note 8, on pages 10-11, *supra;* and *Official-Southern Divisions*, 325 I.C.C. 1 (1965).)

not be permitted to rest on the basis of the vague and generalized opinion of the district court.[13]

II.

The district court held (1) that the Commission must make findings "in terms of dollars" if it is to comply with the requirement of Section 15(6) that it give due consideration to "the amount of revenue required [by the carriers concerned] to pay their respective operating expenses, taxes, and a fair return on their railway property"; and (2) that findings of revenue needs based on comparisons of rates of return do not satisfy the statute. (B. & O. J.S. 11a, 12a, 19a, 20a)

That the Commission considered and made specific findings addressed to the revenue needs factor of Section 15(6) is beyond dispute. Its consideration of this factor runs to fifteen pages in the initial report and seven pages in the supplemental report. (B. & O. J.S. 71a-91a, 132a-142a) In determining the relative financial condition of the groups as measured by the revenues, expenses, taxes, and return from all services, the Commission made specific findings expressed in terms of their average annual rates

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[13] The district court also quotes extensively from *Atchison, Topeka and Santa Fe R. Co.* v. *United States,* 225 F. Supp. 584 (D. Colo., 1964). It is not clear what parallel the district court is drawing between the *Atchison* case and the instant case. In any event, the records and findings in the two cases are vastly different. Unlike the instant case, in *Atchison* the district court had before it minimal findings based on an abbreviated record. In *Boston & Maine Railroad* v. *United States,* 208 F. Supp. 661, 674-675 (D. Mass., 1962), affirmed 371 U.S. 26 (1962), the district court expressly upheld Commission findings which dealt with the northern lines as a group, on the strength of the decisions of this Court. Conflicting expressions in these three district court opinions emphasize the need for plenary review by this Court to remove uncertainty in the interpretation of Section 15(6).

of return on investment over recent years.[14] These rate-of-return findings were based on calculations from dollars of operating revenues, dollars of operating expenses and taxes, and dollars of investment. Rates of return, so calculated, provide a common denominator for comparing railroad groups, and truly reflect the elements named in Section 15(6). Such rates of return on investment are regularly used in the financial world as significant yardsticks of relative financial standing and earning power, and they are equally useful for this purpose in the regulatory world. Neither the words of the statute nor considerations of public policy support the district court's holding that findings of revenue needs must be made "in terms of dollars," rather than in terms of rates of return.[15]

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[14] The finding with which the Commission concluded its discussion of comparative rates of return reads:

> The most favorable comparison from the standpoint of the western lines, we believe, is the showing that the average return of the eastern district and Pocahontas region in 1946-58, based on net railway operating income from all services adjusted for income tax differences as before explained, related to book investment, was 3.26 percent, compared with 3.34 percent for the midwestern group and 3.89 percent for the transcontinental defendants. If the elements of value are used as the investment base, the percentages become 3.40 for the eastern lines, 3.49 for the midwestern group, and 4.64 for the defendants. (B. & O. J.S. 88a)

[15] The phraseology used by the district court in rejecting comparative rates of return as an acceptable test of relative revenue needs indicates that the court did not comprehend either the significance of rates of return or the form of the data on which rates of return are necessarily based. The statement of the district court reads:

> Divisions in general, defendants urge, are made on the basis of "rate of return" figures which are equivalent to divisions in terms of dollars. The court concludes that divisions in

The Commission also applied a second standard of measurement of the relative revenue requirements of the contending railroad groups, *i.e.*, the revenues, out-of-pocket expenses and taxes, and return attributable to the traffic in issue. Although the amounts of these revenues and expenses were stated in dollars in the Commission's report (B. & O. J.S. 64a), such dollars, standing by themselves in a comparison, tell nothing about disparities among the groups. To give significance to those dollars, the Commission translated them into percentages by which the divisional revenues of each group exceed the out-of-pocket

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rates of return are not equivalent to divisions in terms of dollars and that divisions so stated do not satisfy the requirements of the statutes involved, as *they* do not disclose a determination or consideration of all the required elements in arriving at what the Commission concludes are just, reasonable and equitable divisions. (Emphasis added; B. & O. J.S. 19a)

The defendants in the district court did not urge that divisions "are made on the basis of 'rate of return' figures which are equivalent to divisions in terms of dollars." Their contention was that, in considering the revenue needs factor, the Commission properly used rate of return data, which are calculated from the dollars of revenues, operating expenses, taxes and railway property. What the court means by the phrases "divisions in rates of return," "divisions in terms of dollars," and "divisions so stated" is not clear. When the court says that "they [rates of return] do not disclose a determination or consideration of all the required elements," it is plainly mistaken if it is referring to the "elements" of the revenue needs criterion of Section 15(6), since the calculation of rates of return necessarily required the Commission to determine the dollars of revenue, operating expenses, taxes, and railway property. Rates of return so calculated reflect the dollar amounts in the only way such amounts are meaningful for comparative purposes. If the court is referring to all five criteria of Section 15(6), it is making an observation which is wholly beside the point, since neither the Commission in its reports nor defendants in the district court suggested that rates of return disclosed a determination of all the Section 15(6) criteria. The Commission

expenses for each group.[16] (B. & O. J.S. 67a) The district court did not even mention these findings, which are directed to the revenue needs criterion.

These two yardsticks of relative revenue needs used in the instant case are the same as the tests used in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729, 750-755 (1933), 198 I.C.C. 375, 376, 380-384 (1934). The Commission's order in that case was sustained in *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, 360 (1936). Similarly, in *Divisions of Freight Rates*, 148 I.C.C. 457, 476, 478 (1928), the Commission relied on comparative rates of return to measure the "[r]elative financial conditions of the two groups of carriers" and concluded: "That the financial condition of complainants is not on the whole as good as that of defendants." In *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U.S. 74, 79, 81-83 (1930), this Court sustained the Commission's order.

For decades, with the approval of this Court, the Commission has found that the most useful data in measuring revenue needs from all services are relative rates of return. It has also used, with this Court's approval, the percentage relationships of revenues and costs attributable to the traf-

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disclosed its determination of the Section 15(6) elements other than revenue needs by other findings addressed to those elements.

[16] The Commission's finding on this point reads:

> Based on the next-preceding table, our restated costs show that the settled revenue of defendants from the traffic to and from official territory was 157 percent of their out-of-pocket costs. The settled revenue of the midwestern lines exceeded their out-of-pocket costs by 43 percent, and the corresponding excess of the complainants was 22 percent. In the case of traffic to and from midwestern territory defendants' revenue was 171 percent of their out-of-pocket costs while midwestern lines' revenue was 139 percent of their out-of-pocket costs. (B. & O. J.S. 68a)

fic in issue. There is nothing in the revenue needs clause of Section 15(6) which either expressly or impliedly restricts the Commission to findings in terms of absolute "dollars."

III.

The district court held that the validity of the Commission's order in a divisions case is dependent on the presence of accompanying findings which state "in terms of dollars" the differences between revenues produced by the unlawful divisions and revenues which might be produced by the prescribed divisions. (B. & O. J.S. 11a, 12a, 18a, 20a) The Court's construction has no support in the wording of Section 15(6); and it is contrary to the administrative practice of the Commission in prior proceedings in which the orders have been upheld by this Court. (*Supra*, note 8, pp. 10-11)

The Commission made findings of the difference between the prescribed divisions and the unlawful divisions, but not "in terms of dollars." It found that its prescription of divisions within Western Territory would produce "moderate increases" in some of the most important Midwestern divisions (B. & O. J.S. 104a, 153a);[17] and that its prescription of primary divisions on Eastern-Transcontinental traffic would produce an increase of about 16.4 percent in the Eastern divisions. (B. & O. J.S. 145a) There is nothing in the statute which requires more, and there is no policy which would cause Congress to have required more.[18]

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[17] The scales were prescribed within the Western Territory as "an appropriate means of readjusting the intraterritorial divisions" which were found inequitable. (B. & O. J.S. 103a)

[18] The Commission findings go much further than the law requires. Any argument that a finding of revenue effect must be made in a divisions case proceeds necessarily on the assumption

The divisions here involved were not prescribed for the purpose of providing any particular increase or particular reduction in the revenues of any group, and the prescribed divisions give neither the Eastern lines nor the Midwestern lines a share of revenues greater in proportion to others than is reflected in their respective shares of the through costs.[19] Hence, no regulatory purpose would be served by a finding which states "in terms of dollars" the increase or reduction in revenues of any one of the groups that would result from the Commission's orders.

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that a divisions order involves a transfer of property (money) from one ownership to another. That is not the case. This Court observed in *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U.S. 368, 381 (1943), that the prescription of divisions "is not a mere partition of property," and the Commission explicitly recognized in its supplemental report that its prescription of lawful divisions "is in no sense a 'transfer' of money." (B. & O. J.S. 133a) In *Divisions of Freight Rates*, 156 I.C.C. 94, 95 (1929), the Commission made no findings with respect to the financial effect of its prescription of lawful divisions, and refused to reopen the case to receive evidence of that financial effect, stating that its purpose was "'to establish a basis of divisions in line with the evidence, whatever the revenue results might prove to be." The Commission's refusal to grant a rehearing was held not an abuse of discretion or a denial of due process of law in *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 36 F. 2d 789, 798 (W.D. Mo., 1929); and the question was not raised on the appeal to this Court in *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U.S. 74 (1930), where the judgment of the district court upholding the order of the Commission was affirmed.

[19] The Commission stated that the increases in Midwestern divisions "were supported by the evidence concerning cost of service" (B. & O. J.S. 153a); and it found that, under the prescribed divisions, the Eastern lines' share of the through revenues (25.3 percent of the total) would be less than their share of the through costs (26.1 percent of the total). (B. & O. J.S. 144a, 145a)

CONCLUSION.

It is submitted that the district court has seriously misconstrued Section 15(6) of the Interstate Commerce Act. Its decision has imposed requirements on the Commission which are not only meaningless, but are also so burdensome as to frustrate the administrative processes. We believe that the questions presented are substantial, and that they are of public importance.

After nine years before the Commission, these appellants finally obtained orders awarding them "moderate increases" in some of their divisions. Should the judgment of the district court be affirmed, even such incomplete relief would be delayed, at best, for a further indefinite period while the proceedings are back before the Commission. Only this Court can prevent that result.[20]

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[20] The district court set aside the Commission's orders in their entirety, even though it had not held there was error in the Commission's findings that the present divisions are unjust, unreasonable, and inequitable, and the parties were in agreement that the present divisions are unlawful (their disagreement being as to the direction of the unlawfulness). The court denied appellants' request that it retain jurisdiction to require equitable resettlements of divisions in the event of a further order of the Commission upon remand, contrary to the well settled rule that a court of equity has the duty to protect the rights of all parties pending the ultimate determination of the controversy. *Atlantic Coast Line R. Co.* v. *Florida,* 295 U.S. 301, 313-316 (1935); *Inland Steel Co.* v. *United States,* 306 U.S. 153, 156-157 (1939); *United States* v. *Morgan,* 307 U.S. 183, 190-198 (1939); *Addison* v. *Holly Hill Co.,* 322 U.S. 607, 619-623 (1944).

Probable jurisdiction should be noted, and the case should be set for argument on the merits.

Respectfully submitted,

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